

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 THE CIRCLE, SUITE 2
COURTHOUSE
GEORGETOWN, DE 19947

March 31, 2005

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RE: State of Delaware v. Benjamin F. Walls
Def. ID# 0303007019
Memorandum Opinion - Motion for Postconviction Relief

Dear Mr. Walls and Counsel:

This is my decision on Benjamin F. Walls' ("Walls") two Motions for Postconviction Relief. Walls was charged by indictment with Possession of a Firearm During the Commission of a Felony, Assault in the First Degree, Possession of a Firearm by a Person Prohibited, Muzzle Loader Restrictions, and Trespassing. The charges arose out of an incident that occurred while Walls was deer hunting in a field north of Millsboro. Walls, who was armed with a high-powered rifle during the muzzle loader season, shot several times at a deer that was between him and Route 113. One of

the bullets struck a motorist driving on Route 113. Walls was found guilty by a jury on all five counts. I sentenced Walls, as an habitual offender, to 19 years at supervision level V, suspended after serving 16 years at supervision level V for three years of declining levels of supervision. The Supreme Court affirmed Walls' convictions.

Walls has filed two Motions for Postconviction Relief. The first Motion for Postconviction Relief was filed on May 18, 2004. Walls sought relief based upon three grounds. The first ground was ineffective assistance of counsel based upon counsel's alleged failure to properly represent Walls. The second ground was for an allegedly coerced confession. The third ground was double jeopardy and the Court's alleged failure to allow the jury to consider lesser-included offenses. I did not review Walls' Motion for Postconviction Relief at that time because he was still awaiting a ruling from the Supreme Court on his appeal.

Walls filed his second Motion for Postconviction Relief on August 22, 2004. Walls again sought relief based upon three grounds. The first ground was for an allegedly coerced confession. The second ground was ineffective assistance of counsel based upon counsel's alleged failure to properly represent Walls. The third ground was based upon an alleged violation of Walls' due process rights because of the Court's alleged failure to allow the jury to consider lesser-included offenses and cruel and unusual punishment because of the 16 year prison term.

I will combine and review both of Walls' Motions for Postconviction Relief. Walls' motions were timely filed and there are no procedural bars to them. Karl Haller, Esquire("Haller") represented Walls during his trial and Supreme Court appeal. The State of Delaware was represented

by Deputy Attorney General Peggy J. Marshall, Esquire (“Marshall”). Haller and Marshall responded to Walls’ allegations by affidavit. Haller also submitted a supplemental affidavit at my request.

All of Walls’ claims, except for the ineffective assistance of counsel claim, could have been raised on appeal and are, therefore, procedurally barred pursuant to Superior Court Criminal Rule 61(I)(3) unless Walls is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights.¹ However, “this bar to relief does not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”²

DISCUSSION

A. Due Process

Walls argues that his due process rights were violated because certain evidence was not presented to the jury as to lesser-included offenses. The evidence that Walls contends was missing apparently deals with the fact that a number of hunters were hunting that day with shotguns instead of muzzle loaders and that one other hunter also shot towards Route 113. I gather that the point of this is to create doubt as to who shot the victim. This evidence was, in fact, presented to the jury. Martin Taylor, who was hunting with Walls, testified that both he and Walls shot towards Route 113. Taylor shot with a shotgun. Walls shot with a high-powered rifle. The victim was shot with a bullet from a high-powered rifle, which points only towards Walls. The fact that two hunters shot towards

¹*Outten v. State*, 720 A.2d 547, 556 (Del. 1998).

²*Outten*, 720 A.2d at 556, *citing* Super. Ct. Crim. R. 61(i)(5).

Route 113 does not minimize the serious nature of Walls' actions and it does not necessarily entitle him to a jury instruction on a lesser-included offense. Neither the State nor Walls requested that I instruct the jury on lesser-included offenses. In *State v. Cox*, the Delaware Supreme Court held that "the trial judge must give a lesser-included offense instruction at the request of either the defendant or the prosecution – even over the objection of the other party – if the evidence presented is such that a jury could rationally find the defendant guilty of the lesser-included offense and acquit the defendant of the greater offense."³ Walls was charged with, among other offenses, Assault in the First Degree. The State's theory was that Walls, by shooting towards Route 113 with a high-powered rifle, recklessly engaged in conduct which created a substantial risk of death to a motorist driving on Route 113 and did cause serious injury to him. Walls' defense was that it was a mere accident and that he was not guilty of anything. Given Walls' defense, there was simply no reason to give the jury an instruction on any lesser-included offenses.

Walls also contends that no evidence was presented to the jury that would sustain the necessary element of "knowing" on the Possession of a Firearm During the Commission of a Felony charge. Walls has misinterpreted the statute. "Knowingly" is the mental state necessary for possessing a firearm, not for the assault. The evidence presented during trial demonstrated that Walls was in possession of, and actually shot, a rifle at the time in question. There can be no doubt that Walls knew that he possessed a firearm. While Walls may not have intentionally shot the victim, he recklessly engaged in conduct that created a substantial risk of death to the victim and did severely injure him. Thus, there is no merit to Walls' argument.

³ *State v. Cox*, 851 A.2d 1269, 1275 (Del. 2003).

B. Cruel and Unusual Punishment.

Walls argues that excluding the lesser-included offenses resulted in a conviction on a more serious charge, resulting in a 16 year prison term. Walls believes that a 16 year prison term is disproportionately harsh for what he did and amounts to cruel and unusual punishment. Walls could have, if he received an illegal sentence, raised the issue in his appeal to the Supreme Court. He did not do so. Therefore, he waived the right to do so now. Nevertheless, I will briefly address this argument.

In *Solem v. Helm*, the Supreme Court held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.⁴ Appellate review of a sentence generally ends if the sentence falls within the statutory limits prescribed by the legislature.⁵ In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.⁶ Additionally, it is well settled that the “SENTAC” guidelines are not binding on the sentencing judge, and a sentence imposed outside of the guidelines offers no basis for belief.⁷

Walls failed to discuss any proportionality review of his sentence and offers no authority to support his allegation that his sentence constitutes cruel and unusual punishment. Assault in the First Degree is a class C felony and carries a sentence of incarceration of up to 10 years. Possession of a Firearm during the Commission of a Felony (“PFDCF”) is a class B felony and carries a sentence

⁴ *Solem v. Helm*, 463 U.S. 277 (1983).

⁵ *Maynes v. State*, 604 A.2d 839, 843 (Del. 1992).

⁶ *Boo'zo v. State*, 846 A.2d 237 (Del. 2004), 2004 WL 691903 at **3.

⁷ *See Gaines v. State*, 571 A.2d 765, 766-67 (Del. 1990).

of incarceration of not less than three years and up to 20 years.⁸ However, “[a]ny sentence imposed upon conviction for possession of a firearm during the commission of a felony shall not run concurrently with any other sentence.”⁹ Possession of a firearm by a person prohibited (“PFBPP”) is a class D felony and carries a sentence of incarceration of up to 8 years. Walls’ incarceration period falls within the statutory limits, and clearly does not amount to cruel and unusual punishment. Thus, there is no merit to this argument.

C. Double Jeopardy

Walls alleges that he was subjected to double jeopardy because he was initially charged with both Reckless Endangering in the First Degree (the lesser charge), Assault in the First Degree (the greater charge), and two counts of Possession of a Firearm during the Commission of a Felony. The State filed a nolle prosequi on the count of Reckless Endangering in the First Degree and one of the two counts of Possession of a Firearm during the Commission of a Felony before the trial started. Jeopardy did not attach until the jury was empaneled and sworn in.¹⁰ Thus, there was no double jeopardy violation. Walls also contends that there was a double jeopardy violation because no lesser-included jury instructions were given. I have discussed this argument previously and concluded that there is no merit to it.

D. Coerced Confessions

Walls alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the police. Walls alleges that upon being taken into custody he invoked his right to counsel. Walls

⁸ 11 Del. C. § 1447(A) (b).

⁹ 11 Del. C. § 1147(A) (e).

¹⁰ *Downum v. U.S.*, 372 U.S. 734 (1963).

contends that despite this the police questioned him and made threats against his family. It was only after the threats, Walls alleges, that he broke down and agreed to give the police a statement as to the location of the rifle. Once the rifle was retrieved by the police, Walls contends that his Miranda rights were read to him for the first time.

Walls' allegations are not even supported by his own motions or the facts. In Walls' first motion for postconviction relief, he alleged that he requested an attorney, that one was not provided, and that he was not Mirandized before he was taken into custody and questioned. In Walls' second motion for postconviction relief he stated, in Footnote one of the attached memorandum of law, that after he was Mirandized, he expressed his right to counsel. Walls' statements are inconsistent with each other. They are also inconsistent with Marshall's affidavit. Included in Marshall's affidavit as Exhibit No. 1 was Sgt. Brown's Supplement No. 3 of the police report which detailed the facts and circumstances of Walls' arrest and statements. Sgt. Brown indicated that after Walls was Mirandized he requested an attorney. While Det. Gallagher was obtaining pedigree information from Walls, Sgt. Brown told Walls that he had obtained search warrants for his home and his brother's home. Upon hearing this Walls stated that he wanted to speak to his brother because he didn't want to involve him in this matter. Walls was reminded by the police that he had requested an attorney and because of that the police were unable to speak with him. Sgt. Brown indicated that Walls understood this, but that he just wanted to get it over with.¹¹ It was at this point that Sgt. Brown stated Walls indicated his willingness to speak with the police. Walls has not presented the Court with any reliable facts that would suggest there was in any way a miscarriage of justice. Similarly,

¹¹ See *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981)(A defendant who reinitiates a conversation with the police, after a valid invocation of the right to counsel, will be deemed to have waived his/her right to counsel.).

Walls has not offered any information to indicate that his statements were in any way coerced.

D. Ineffective Assistance of Counsel

Walls alleges that Haller failed to adequately investigate the case, failed to present a defense, failed to present witnesses to rebut the State's witnesses, failed to review the medical testimony, wrongly stipulated to prior felony convictions, did not know the applicable gun law, advised Walls to "take a trip," failed to order a full transcript, did not thoroughly investigate the applicable law, did not adequately prepare for trial, failed to file a motion to suppress, did not interview potential witnesses, failed to present exculpatory evidence, failed to request jury instructions on lesser-included offenses, and allowed the State to proceed on charges that failed to put him on notice of what he was facing. The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.¹² In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.¹³ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.¹⁴ Second, the defendant must show that the deficient performance prejudiced the defense.¹⁵ Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."¹⁶ It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell

¹² *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³ *Strickland*, 466 U.S. at 687.

¹⁴ *Id.* at 687.

¹⁵ *Id.* at 687.

¹⁶ *State v. Coleman*, 2003 WL 22092724 (Del. Super. Ct.).

within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”¹⁷ There is no procedural bar to claims of ineffective assistance of counsel.¹⁸

I. Investigation and Trial Preparation

Walls alleges that his case was novel and difficult and that Haller failed to adequately investigate the facts of the case and research the applicable law. Haller’s affidavit indicates that he went to and inspected the crime scene, that he requested and received discovery, including police reports, witness statements, and Walls’ own statements. Haller’s affidavit also indicates that he had his investigators interview witnesses and submit reports to him. Haller’s affidavit also states that he has had many cases involving assault and firearm charges, and that he has thoroughly researched and is familiar with the legal issues that these types of charges present. The case was, despite Walls’ allegations, quite straightforward. Walls was hunting with a prohibited weapon and shooting towards a busy highway. Haller’s affidavit indicates that he was familiar with both the facts and the applicable law. Haller’s performance at trial demonstrated that he was well prepared. It is clear to me that Haller’s efforts did not fall below an objective standard of reasonableness under the *Strickland* standard.¹⁹ Other than making naked assertions, Walls has not established what other evidence or law should have been presented and how it would have made a difference in the outcome of his case.

¹⁷ *Coleman*, 2003 WL at *2, quoting *Strickland*, 466 U.S. at 689.

¹⁸ *Coleman*, 2003 WL at *1, citing *State v. Johnson*, Del. Super. Ct., Cr. A. No. 97-10-0164(R1), Graves, J. (August 12, 1999) at 2; *State v. Gattis*, Del. Super. Ct., Cr. A. Nos. IN90-05-1017 to 1019, Barron, J. (December 28, 1995) at 7, *aff’d*, 637 A.2d 1174 (Del. 1997).

¹⁹ *Strickland*, 466 U.S. 668 (1984).

II. Failure to Present a Defense and Rebut the State's Witnesses

Walls alleges that Haller failed to present a defense or rebut the State's witnesses. Haller's defense was that the incident was merely an accident. Haller offered a witness, David Tyre, to support this defense. Tyre testified that the deer Walls was shooting at was in a ravine and there were other people hunting nearby that day. However, none of the other hunters were shooting towards Route 113 with a high-powered rifle. The jury was free to accept this defense, but did not do so.

Walls also alleges that Haller was ineffective because he failed to rebut the State's medical evidence, thus allowing the victim to appear sympathetic to the jury. It is Walls' contention that the victim's injuries were exaggerated by the State and that Haller did nothing to counter this. Haller's position on this allegation is that the incident was an accident and that he could not have gotten a medical expert to testify that the victim's injuries were not serious or life-threatening. Walls' argument lacks merit. The evidence regarding the victim's injuries showed, among other things, that the victim had to have a titanium plate inserted in his skull and that he narrowly escaped death. There was, quite frankly, little that Haller could have done with this testimony. It clearly and convincingly established the seriousness of the victim's injuries. As to the other State's witnesses, Walls has not explained in a meaningful way how their testimony could have been rebutted. Haller's representation clearly did not fall below an objective standard of reasonableness. This allegation is without merit.

III. Stipulation to prior felony convictions

Walls alleges that Haller was ineffective because he stipulated that Walls had prior felony convictions. This was an element of the PFBPP charge. It is Walls' belief that this information

prejudiced the jury against him. If anything, the stipulation benefitted Walls because the details concerning his prior felony convictions did not come before the jury. Furthermore, Haller stated in his affidavit that the stipulation was discussed with and agreed to by Walls, and that, as a practical matter, there was simply no basis to object. I agree and conclude that this allegation is without merit.

IV. Applicable gun law

Walls alleges that Haller was ineffective because he did not know the applicable law on the use of firearms. Walls offers little to support this claim except to say his situation was identical to that of Martin Taylor's. Taylor was hunting with Walls on the day in question. However, Taylor was hunting with a shotgun. Leading up to the shooting of the victim it appears that the behavior of Walls and Taylor was identical. For example, Walls' alleges that they both got off of an all-terrain vehicle and shot down into the ravine towards a deer. Based on this, Walls believes his punishment should be identical to Taylor's. It is Walls' belief that if his behavior was reckless, then so was Taylor's. The obvious difference between Taylor and Walls' behavior was that Walls was using a high-powered rifle, which was prohibited, and Taylor was not. The second obvious difference is that it was a bullet from Walls' rifle that injured the victim. Walls and Taylor simply did different things and were treated accordingly. This allegation is without merit.

V. "Take a trip" allegation

Walls alleges that Haller advised him to "take a trip" on the last day of trial. Walls does not offer any facts to support this allegation. Indeed, Walls simply states that it was implied to him by Haller. Haller denies this accusation in his affidavit, and states that he had a suspicion that Walls would not show up for the last day of trial because of the overwhelming evidence of Walls' guilt.

Given this, I have no reason to believe that Walls' allegations are credible. This allegation is without merit.

VI. Failure to order a full transcript

Walls contends that Haller was ineffective because he did not order a full transcript of the proceedings for the appeal. Supreme Court Rule 9(ii) states that appellant "shall include in the notice of appeal either a statement *designating such parts of the proceeding as are deemed necessary* to be transcribed for inclusion in the record..."(emphasis added).²⁰ Haller indicates that he ordered the parts of the transcript that were necessary for the appeal. Haller was bound by Supreme Court Rule 9(ii), and was therefore effective. Walls does not state or suggest what part or parts of the transcript were necessary and should have been ordered. This allegation is without merit.

VII. Lack of notice

Walls alleges that Haller erred by allowing the State to proceed on charges in the indictment that did not put Walls on notice of the specific allegations against him. The indictment identified the charges levied against Walls, it identified the section numbers of the criminal code Walls was being charged under, it stated the date of the offenses, and it stated the name of the victim. Haller states in his affidavit that this was enough information to allow him to go to the scene of the alleged offenses and examine and photograph it. It is obvious to me, based upon Haller's command of the facts at trial, that both Haller and Walls were adequately informed of the nature of the charges Walls was facing and that they were able to prepare a defense to them. This allegation is without merit.

²⁰ Del. Supr. Ct. R. 9(ii).

VII. Motion to Suppress

Walls alleges that Haller was ineffective because he did not file a motion to suppress statements allegedly coerced from Walls in violation of his constitutional rights. Haller states that he reviewed the facts and ultimately decided not to file the motion based upon the evolution of the law in this area in the last several years. Haller examined the police reports, and a tape recording in which Walls was given his Miranda rights and he stated he understood them. Haller also discussed the matter with Walls before making a decision. The police report indicates that the police were hesitant to talk with Walls after he invoked his rights and only did so after Walls made it abundantly clear that he wished to talk to them. More importantly, the police report indicates that Walls knowingly waived his Miranda rights because he did not want to get any third parties involved. Due to Walls' apparent knowing waiver of his Miranda rights, Haller did not err by not filing a motion to suppress.

IX. Did not interview witnesses provided by Walls

Walls alleges that Haller was ineffective because he did not interview witnesses provided by him. In his affidavit, Haller stated that Walls provided the names of Sid McBroom, David Tyre, and N. Taylor.²¹ Haller got statements from McBroom and Tyre and actually called Tyre as a witness for Walls. Haller stated in his affidavit that he was unable to contact N. Taylor. It is clear that Haller attempted to contact all of the potential witnesses provided by Walls and got statements from two of them. Walls has not, in any meaningful way, raised any credible doubts about Haller's efforts. Thus, there is no merit to this allegation.

²¹ Haller refers to a person by the name of N. Taylor. After reading Haller's affidavit and Walls' Motions, it is my belief that Haller made a typographical error and meant M. Taylor or Martin Taylor instead of N. Taylor.

X. Failed to request jury instructions on lesser-included offenses

Walls alleges that Haller was ineffective because he failed to request jury instructions on lesser-included offenses. Haller states in his affidavit that he does not see how the evidence would support jury instructions on lesser-included offenses. I agree that it would not. The rifle used by Walls is a firearm, which is an essential element of both of the PFBPP and PFDCF charges. The assault in the first degree charge can be substantiated by the fact that the bullet was embedded in the head of the victim, thereby creating a substantial risk of death. Given the evidence and the nature of Walls' defense, there was simply no rational basis for any lesser-included offenses. This allegation is without merit.

XI. Failure to present exculpatory evidence

Walls alleges that Haller failed to present exculpatory evidence. Haller states that he called David Tyre as a witness, that he tried to create reasonable doubt by arguing that there were other hunters in the area, that he tried to demonstrate that the accident was unavoidable, and that he suggested that the shots were fired down and into a ravine instead of being fired parallel to the ground. Haller clearly attempted to present exculpatory evidence to the jury. The fact that the jury did not accept the evidence does not make Haller's efforts ineffective. This allegation is without merit.

CONCLUSION

Walls' Motion for Postconviction Relief is denied for the foregoing reasons.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tl

cc: Prothonotary's Office